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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONERS

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CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 483 F. 2d 1059.

The opinion of the United States District Court for the District of Nebraska is reported in 342 F. Supp. 616.

The jurisdiction of this court is invoked under the authority granted it to review by writ of certiorari to any civil case in the courts of appeals under 28 U. S. C. § 1254 (1). The judgments sought to be reviewed were entered

by the United States Court of Appeals for the Eighth Circuit on August 2, 1973, petition for rehearing and suggestion for rehearing en banc was denied by said court on September 12, 1973, and the petition for certiorari was filed in this court on October 23, 1973, within 90 days of the entry of the judgment sought to be reviewed as provided by 28 U. S. C. 2101 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in

any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(3) 42 U. S. C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(4) 42 U. S. C. § 1985:

"(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so

attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may

have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(5) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(6) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 29-2204, Reissue Revised Statutes of Nebraska 1943, Volume 2A, page 467:

"29-2204. Sentence; term of imprisonment; hard labor; solitary confinement. In all cases when any person shall be convicted of any offense by this code declared criminal, and made punishable by imprisonment in the Nebraska Penal and Correctional Complex, the court shall declare in its sentence for what period of time, within the respective periods prescribed by law, such convict shall be imprisoned at hard labor in the Nebraska Penal and Correctional Complex; and shall moreover determine and declare in its sentence whether any such convict shall be kept in solitary confinement in the cells of the Nebraska Penal and Correctional Complex, without labor, and if so, for what period of time."

QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances, if any, does procedural due process require the state to furnish counsel or

permit retained counsel for inmates in prison disciplinary proceedings?

2. Should the state penal authorities or the federal district court lay down minimum procedural due process requirements for disciplinary hearings in penal institutions in the first instance?

3. Are state prison authorities barred from opening incoming mail from attorneys, if such mail is opened in the presence of the inmate addressee for the sole purpose of inspecting for contraband not otherwise discoverable?

4. Must state penal authorities furnish legal assistance, or a reasonable alternative, to inmates to prepare civil rights actions as well as habeas corpus suits?

5. May the federal courts order newly devised prison procedural requirements to be applied retroactively to prior prison disciplinary proceedings?

———o———

STATEMENT OF THE CASE

Robert O. McDonnell brought this civil rights action on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex alleging that disciplinary proceedings in the Complex were conducted without regard to procedural or substantive due process, that the inmate legal assistance program did not meet constitutional standards and that the regulations regarding inspection of incoming mail from attorneys to inmates were violative of the inmates' constitutional rights.

Prison disciplinary proceedings in the Nebraska Penal and Correctional Complex are conducted without lawyers on either side. The Penal and Correctional Complex had adopted rules and regulations for the conduct of disciplinary proceedings which are set forth in Appendix 2 of the Petition for Writ of Certiorari, p. App-45 (Appendix Q of Federal District Court Opinion in 342 F. Supp. 616 at 645).

A lay inmate legal assistant has been appointed by the Warden for the benefit of those offenders in need of legal assistance in the courts. No other inmate other than the legal advisor is permitted to assist other inmates in the preparation of legal documents unless with the specific written permission of the Warden. Appendix 2 of the Petition for Writ of Certiorari, p. App-30. (Appendix C and D of 342 F. Supp. 616 at 631.)

The law library itself is open on Monday, Tuesday, Wednesday, Thursday and Friday evenings for independent research by an inmate unassisted by the legal assistant. The law library is open from five p. m. to seven p. m. on Tuesdays and Thursdays and from six p. m. to seven p. m. on Monday, Wednesday and Friday. For security reasons, the number of inmates that may be allowed in the library at any one time is six. Some inmates have a conflict with school attendance on these evenings.

The district court found that it had examined over fifty petitions in the last twelve months originating in the Penal Complex which were sufficiently drafted to apprise the court of the claim and that in addition the court appoints counsel for 95 percent of all the habeas corpus petitions and most of the civil rights cases where complex,

factual allegations are involved including the appointment of counsel in the present case. Appendix 2 of the Petition for Writ of Certiorari, p. App-20, (342 F. Supp. 616 at 621.)

The Court of Appeals in the present case in the judgment now questioned ordered that the Federal district court and not the state authorities should lay down the specific requirements, including the circumstances in which counsel may be required, in prison disciplinary hearings. Appendix 1 to Petition for Writ of Certiorari, p. App-4; (483 F. 2d 1059, 1063).

The court further held that as to the general inmate legal advisor program the defendants must take into account the need of inmates for assistance in civil rights actions as well as habeas corpus suits. The court further held that there be expunged from prison records, determinations of misconduct arrived at in hearings that failed to comport with the new minimum requirements to be established by the district court. That in cases where the district court determined counsel should have been furnished that the order would be retroactive and the state would be afforded an opportunity to provide counsel on cases which must be reheard for lack of procedural or substantive due process pursuant to that opinion and the state's decision not to provide counsel could be reexamined by the district court in light of *Scarpelli*. See Appendix 3 relating to rehearing.

The court also held that mail from an attorney to an inmate could not be inspected for contraband absent some exceptional circumstance and that a simple telephone call

could be used to ascertain if the letter was actually from an attorney.

The basis for the federal jurisdiction in the first instance was the Civil Rights Act, 42 U. S. C. § 1983 and § 1985.

SUMMARY OF ARGUMENT

1. The Court of Appeals has not only applied the procedural guidelines of *Morrissey v. Brewer* and *Gagnon v. Scarpelli* carte blanche to disciplinary proceedings, it has even gone further and directed the Federal district court to make specific requirements when legal counsel may be required in such proceedings. *Morrissey v. Brewer* refused to require counsel as to parole revocations and *Gagnon v. Scarpelli* refused to set any hard and fast rules in probation revocation.

In tracing the history of corrections, imprisonment is of relatively recent origin. In both the Quaker concept and the Puritan system, solitary confinement was not uncommon.

(a) Before it can be determined whether or not there are circumstances in which counsel is required at disciplinary proceedings, it must first be determined whether any due process is due. In other words, when a person is given due process during the investigatory stage, the trial, the sentencing, and possibly another due process revocation of probation hearing, it is finally determined that the felon should be sent to a prison, from a consti-

tutional sense has he not received all the due process that is due for the various types of treatment and restrictions he may receive in prison so long as the same is not cruel and unusual? While present policy dictates fair and rehabilative measures, is not the only constitutional restriction so far as treatment and discipline are concerned the restriction against cruel and unusual punishment?

After this court in *Morrissey v. Brewer* reversed the Eighth Circuit, petitioners (defendants) dropped their contention that minimum procedural due process was not applicable as to revocation of good time which, in Nebraska is directly related to parole. However, since *Preiser v. Rodriguez*, the issue of good time revocation is no longer involved in this case.

The rudimentary due process requirement of *Goldberg v. Kelly* is not the minimum requirement of all human relationships. It must be determined first that there is a deprivation of liberty before the exact nature of the due process safeguards must be ascertained.

(1) This court has already noted the difference between the liberty of a prison inmate and that of one on parole or probation and that summary treatment may be necessary to controlling prisoners in actual physical custody.

(b) Assuming that there is some due process due in such proceedings, a number of prison administrators and other interested groups have formulated proposed guidelines and procedures for the conduct of such hearings. Most, if not all of said recommendations recognize the impossibiilty of providing counsel at said proceedings.

Furthermore, a requirement that counsel be provided in certain types of disciplinary hearings would certainly open the door to untold numbers of civil rights actions in the other cases where counsel was not provided.

2. Both *Morrissey v. Brewer* and *Gagnon v. Scarpelli* left the initial drafting of the rules of procedure to the body charged with conducting the hearing; the direction of the court below that the Federal district court make this determination should be reversed.

3. A prison rule that suspect mail, even from attorneys, may be opened, but not read, to inspect for contraband in the presence of the inmate addressee would not be an unreasonable invasion of the right to access to the courts. The directions of the Court of Appeals in the present case are confusing and burdensome of enforcement.

4. The requirements of *Johnson v. Avery*, that prison authorities may not prevent one inmate from assisting another in the preparation of actions for post conviction relief unless a reasonable alternative is furnished should not be extended to the preparation of civil rights cases. Such an extension would put an unreasonable burden upon the Federal courts as well as the prison administration in the absence of any constitutional right requiring it.

5. The new guidelines for parole revocations in *Morrissey v. Brewer* were applied to future cases only and there is no reason to apply prison discipline requirements based thereon, retroactively.

———o———

ARGUMENT

1. Requiring Counsel at Prison Disciplinary Hearings

Introduction

On page 4 of the current opinion, the Honorable Judge Heaney, after stating that the procedural requirements of *Morrissey v. Brewer,* 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (revocation of parole), and *Gagnon v. Scarpelli,* (May 14, 1973), 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756, (probation revocation), should be generally followed in prison disciplinary proceedings, goes on to direct the district court to make specific requirements when *legal counsel* may be *required* in such proceedings. This is a great extension of both *Morrissey v. Brewer* and *Gagnon v. Scarpelli* and any previous holdings of the United States Supreme Court.

In *Morrissey v. Brewer,* of course, the United States Supreme Court stated as to parole revocations:

> "* * * Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. * * *."

The Court then specifically stated:

> "We do not reach or decide the question whether the parolee is entitled to the *assistance of retained counsel or to appointed counsel* if he is indigent." *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484 at 499. (Emphasis added.)

The United States Supreme Court decided in *Gagnon v. Scarpelli, supra,* that as to probation revocations, the question of right to counsel should be decided upon a case-by-case basis and specifically distinguished such a hearing from a criminal trial, stating:

> "In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented not by a prosecutor but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives not from the invariable attributes of those hearings but rather from the peculiarities of particular cases." *Gagnon v. Scarpelli,* 411 U. S. 778, 36 L. Ed. 2d 656 at 665.

The above distinctions are even more true as to disciplinary proceedings in prison. There is no lawyer or prosecutor present for the state and the formal procedures and rules of evidence are certainly not employed.

Judge Heaney cites *Remmers v. Brewer, et al.*, No. 72-1490, (C. A. 8th, Mar. 12, 1973), and *Dodson v. Haugh, et al.*, No. 72-1314, (C. A. 8th, Feb. 14, 1973), for the proposition that the Eighth Circuit has held that minimum procedural due process requirements are applicable to prison disciplinary hearings.

While this is certainly true, neither case extends the requirement to include a right to counsel.

In view of the state of the law as to right to counsel at parole revocation hearings and probation revocation hearings, where the actual freedom of an individual is at stake as compared to the lesser rights involved in prison disciplinary hearings where the conditions of custody of one who has already lost his freedom are involved, and where the hearings are entirely conducted by lay individuals unschooled in the law, not to mention the financial, planning and scheduling impact a requirement of legal counsel for inmates would have in state and federal prisons nationally (and the concomitant problems of furnishing attorneys for prison officials,) we respectfully request this court settle the law on this question as well as the others set forth below. Even if a requirement of counsel would only result in limited use of lawyers, the fact of such a requirement would lead to untold thousands of new civil rights actions in hearings where counsel was denied. And as illustrated later, there are not enough lawyers in the United States to do the job anyway.

This court is of course well aware of the terriffic congestion in the Federal Courts throughout the Nation, a great percentage of which involves civil rights actions by prison inmates. It would serve no useful purpose at

this point for the petitioners to attempt to set forth all of the varied rulings by the Federal District Courts and the Courts of Appeals concerning notice, hearing, cross-examination and all of the other many issues being litigated in regard to prison disciplinary hearings; it is interesting to note, however, that until a few years ago the Federal Courts would rarely interfere with state prison administration except in cases involving cruel and unusual punishment. Now, with the hundreds of Federal Court decisions concerning state prison administration, state prison administrators must wonder if incarceration is any longer a legal form of punishment for those convicted of crimes.

Sometimes it is well for us to go back to the early beginnings to see where we have arrived today. A succinct history of corrections is contained in House Report No. 93-329, 93rd Congress, 1st Session, June 26, 1973, which states in part as follows:

> "I. CORRECTIONS—BRIEF HISTORY
>
> "In tracing the history of corrections we need to recall that until the age of enlightenment the criminal law was a barbaric, brutal institution. Governments were arbitrary, capricious, and inhumane in administering criminal penalties: Offenders were commonly disemboweled. At one time in England capital punishment was administered for stealing as little as a few shillings' worth of property. During the 18th century enlightened minds began to revolt over the penal system's brutalities.
>
> "As a penalty for those who violate the law, imprisonment is of relatively recent origin. Imprisonment did not become society's principal method of punishment until the latter part of the 18th century. One

root of the American correctional system can be traced to early English and European workhouses and houses of correction dating from the middle of the 16th century. These institutions were built in response to increasing numbers of beggars, vagrants, and petty thieves who plagued the urban communities of the late Middle Ages. In time the high hopes for these institutions evaporated as they increasingly functioned as catchalls for a variety of petty offenders, troublesome individuals, and mental defectives.

"Great social philosophers—Montesquieu and Voltaire—pleaded for the recognition of certain human rights for those charged with crime. An Italian nobleman named Beccaria, the first reformer to formulate the concept of the modern system of justice, pleaded for punishments appropriate to particular crimes, for fair trials, and for the end of confessions induced by torture. In England, John Howard analyzed and criticized the prison systems of the day; and in America, John Adams and Thomas Jefferson took up the fight for penal reform.

"The American penal system had two principal models. The Pilgrims, who left England because of social injustices, brought with them criminal codes almost as severe as those which they left behind. An exception to these harsh Colonial laws was the 'Great Law' of William Penn, embodying the comparatively humane Quaker criminal code. The Quakers provided the keystone around which penal reform developed in America. This New World reform was accompanied by parallel developments in England and on the Continent. Following the revolutions which brought democracy to France and America, the Quakers developed strong allies in their drive for humane treatment of offenders and in the substitution of imprisonment for corporal and capital punishment.

"In 1794, Pennsylvania adopted a new code which reduced the list of capital crimes to first-degree murder and prescribed imprisonment for other offenses. This was the beginning of what is known as the 'penitentiary,' a word taken from the Quaker concept of giving a man a Bible and putting him in a cell to repent.

"Whether the productive labor of the prisoner was to be given priority over his moral regeneration became the basis of a long conflict between the Quaker model penitentiary constructed at Cherry Hill, Pa., in 1829, and the Puritan prison built at Auburn, N. Y., in 1823. The objective of the Quaker penitentiary system was to save the sinner through reflection and penitence. The objective of the Puritan system, on the other hand, was to produce obedient citizens. Prisoners at Auburn were confined to solitary cells at night, and during the day worked together under a rule of silence. Since the 'congregate' or Auburn system, was copied in one form or another in many States, the Puritan model became the prevalent prison system in the United States and, until the Civil War, the so-called industrialized prisons, which were fashioned after the Auburn model and which utilized prison labor for profits to prison officials and the States, increased in number. Following the Civil War, however, the radical changes which shook the Nation's economy had an adverse effect on prison industries, and prison overcrowding began to alter the Auburn single-cell theory.

"At the turn of the 20th century, reforms instituted included construction of heating and toilet facilities, providing health and medical services, and providing for athletic activities. Although many prisons remained industrialized, pressure against prison-made goods was mounting and by the 1930's, Federal legislation virtually ended the sale of prison goods. World War II saw the introduction of the concept of 'classification' which was used initially in relation to security. Classification is the correctional process of divid-

ing offenders, based on known characteristics, for security and treatment purposes. The 1940's also saw the prisons opening their gates to a limited number of teachers, social workers, and psychologists.

"In the 1950's and 1960's, a little advancement in penal reform was made, although a small number of progressive institutions made headway in developing concepts aimed at rehabilitating the prisoner rather than maintaining a system directed toward the 18th and 19th centuries' focus on retribution, penitence, and punishment."

(A REPORT BY THE SELECT COMMITTEE ON CRIME, House Report No. 93-329, Union Calendar No. 157, 93rd Congress, 1st Session, June 26, 1973.)

(a) How far does the due process given a defendant during investigation, trial, conviction and sentence extend into the prison environment or is any due process due?

Before the question of right to counsel, if at all, in disciplinary proceedings can be answered, the more fundamental question must be probed as to whether due process is due a prison inmate not only in disciplinary proceedings but in the other various proceedings which go on within a penitentiary. The Constitution of the United States as well as the Constitution of the State of Nebraska specifically recognizes that the State has the power to imprison or even take a life so long as "due process" and "on the indictment of the Grand Jury" are followed; Amendments Five and Fourteen, United States Constitution, Article I, Section 3, Nebraska Constitution ("no person shall be deprived of life, liberty or property without due process of law").

For the purposes of argument, we must assume that the courts in sentencing the inmates here in question did so under due process of law and under valid statutes authorizing a period of time in a state or federal penitentiary. The basic fundamental question which must next be answered is what is the totality of the circumstances, the way of life, the conditions, and the environment contemplated by the Constitution, the statutes, and the sentencing court when committing an inmate by due process of law to "imprisonment" in a state or federal prison? Is not all the Constitution, by its terms, thus preserved to such persons is that such punishment not be cruel and unusual? We are all familiar with certain judicial statements in recent years that a prison inmate does not lose all of his constitutional rights (in addition to cruel and unusual punishment) by going to prison. But such statements as to this problem are made without citation of authority and have been arrived at by the bootstrap method. We are not advocating that the "slave of the state" concept of prison inmates should be retained or returned to, but we are seriously concerned with how much of the question or questions here involved are bound up with policy decisions and how much with constitutional rights. Does not the commitment to a penitentiary, so far as the Constitution of the United States is concerned, in fact, contemplate that the person is being punished for a crime and that he is in fact losing the rights of a free citizen and his liberty? Does the Constitution actually reserve any rights of a free citizen, applicable here, to such persons other than such punishment shall not be cruel and unusual? In other words, when the prison inmate received his due process during the investigatory stage of the al-

leged crime, the trial and the sentencing, and the court, after all this, determined that he should go to the penitentiary, hasn't he received his procedural due process to be in the kind of a place he is in and subjected to the kinds of things to which he is subjected so long as they do not amount to cruel and unusual punishment which is, by the Constitution, prohibited without any further procedural due process?

Petitioners are certainly not advocating that inmates should be disciplined for charges of serious misconduct without adequate notice and fact finding hearings, or, for that matter, that work release programs or the many other humanitarian reforms which have been instituted in the Nebraska Penal and Correctional Complex be removed or infringed but, on the contrary, that the goals of corrections should be the rehabilitation of the inmate, reduction of recidivism and protection of society. However, petitioners suggest that these are matters of policy and not required by the Constitution; we contend, in the words of the majority in *Morrissey v. Brewer, supra,* at 408 U. S. 481, that "the nature of the interest" of the inmate is not one "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Since deprivations of good time were ruled out of this civil rights case by the court below, (App 1, Petition for Writ of Certiorari, p. App-6, 483 F. 2d 1059, 1064.) the most severe punishment in the penitentiary under consideration is that of confinement in the Adjustment Center or what is commonly referred to as "solitary confinement." Section 29-2204, R. R. S. Nebraska 1943, which has not been amended since 1929, set forth above requires the court in sentencing to state the amount of time the convict

is to be kept in solitary confinement. The commitments under this statute could sentence an inmate in the first instance to solitary confinement for a certain period or could provide that solitary confinement should be no part of the sentence except for violation of prison rules. Thus, the sentencing court in Nebraska after the due process trial, may either determine what portion of the sentence must be spent in solitary confinement at the beginning or require solitary confinement for violations of prison rules.

A point relating to petitioners' position should be clarified.

The United States Court of Appeals for the Eighth Circuit in the present case, referring to the fact that it had been reversed in *Morrissey v. Brewer*, 408 U. S. 471, subsequent to the trial in the present case stated:

> "In view of the developments in the law, subsequent to trial, the defendants *no longer contend* that inmates are not entitled to minimum due process in disciplinary hearings which may result in the loss of good time, or the imposition of other substantial penalties. Instead, they argue that existing procedures provide such due process. * * *." (Emphasis supplied.) (App 1, Petition for Writ of Certiorari, p. App-3, 483 F. 2d 1059, 1062.)

The statement of the court is accurate as to the defendant's position on revocation of good time, as clearly limited in our brief in that court, because in Nebraska good time is directly related to parole-involved in *Morrissey;* this is no longer in the case because of the holding in *Preiser v. Rodriguez*, 411 U. S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827 requiring a habeas corpus proceeding. Obvi-

ously, any other concession of the attorney for petitioners as to other types of punishment would be completely irrelevant now since the U. S. Supreme Court had not yet determined that any procedural due process was due and we now question whether such is the case. Furthermore, obviously petitioners (defendant's below) do not have the power or authority to confer, take away, or determine constitutional rights.

The fact that many prison administrators, wardens, interested associations and others are drafting some form of rules for disciplinary procedures and all of the activity in this regard in the recent years is undoubtedly the result of their feeling that they are required to do so by the activist approach of the Federal District Courts and the United States Court of Appeals throughout the nation and particularly the specific requirements and supervision by the federal district judges over prison rules and regulations such as in *Morris v. Travisono,* 310 F. Supp. 857 (D. R. I. 1970), discussed infra, and *Wright v. Jackson,* — F. Supp. —, CV186-73-AM (U. S. D. C. Vir. Nov. 1973). One writer has analyzed a number of the well known lower Federal Court cases relating to prison discipline most of which in one way or another rely upon *Goldberg v. Kelly,* 397 U. S. 254; he points out that there is a different issue in the case involving prison disciplinary proceedings than in *Goldberg,* because in prison disciplinary proceedings there are times when the prison setting permits the use of summary proceedings in the disposition and at other times the rudimentary due process requirements are less than in the factual situation of *Goldberg,* stating:

"* * *. In *Clutchette, Krause,* and the first *Sostre* case, the courts assumed that the words 'rudimentary due process' referred to a conceptual due process guarantee that would be present whenever someone was subject to 'grievous loss.' If such loss was present, the *Goldberg* due process safeguards would automatically attach. There are two major reasons why this analysis is unwarranted: (1) the *Goldberg* court limited its decision to the exact factual situation before it; and (2) due process does not always require *Goldberg*-type protections.

"In *Goldberg,* the Supreme Court ruled that certain 'minimum procedural safeguards' were necessary due to the 'particular characteristics of welfare recipients' and 'the limited nature of the controversy to be resolved.' The Court also stated that it was dealing with 'rudimentary due process' in a 'developing area of law.' The Court was referring to the relatively new area of state and federal welfare law. It is unrealistic to argue that the words 'rudimentary due process' refer to anything other than 'rudimentary due process' under the particular facts of *Goldberg.* The words do not apply to every situation in which a person may be 'condemned to suffer grievous loss.'

"Due process does not always require *Goldberg*-type protections. The *Goldberg* Court stated that:

> "'[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as the private interest that has been affected by governmental action.'

"If the concept were adopted that the Fourteenth Amendment required *Goldberg*-type standards as 'rudimentary due process' in every case, due process would no longer be a flexible tool. The only reason a court would have for using a balancing of interests test would be to determine if more than *Goldberg*-

type safeguards were needed in a certain case. Under this theory, no circumstances could arise in which due process would demand *less* than a *Goldberg*-type hearing." (NORTH DAKOTA LAW REVIEW, Vol. 49, No. 3, Spring 1973, p. 690.)

He then concludes:

"* * *. If such deprivation does exist, (of life, liberty or property) the court must next determine the exact nature of the due process safeguards which will satisfy the Fourteenth Amendment. The court's decision, in this second step, is formulated by balancing the nature of the inmate's interest against the nature of the burden that a strict trial-type hearing will work upon the prison administration." (NORTH DAKOTA LAW REVIEW, Vol. 49, No. 3, Spring 1973, p. 696). (Parenthetical phrase supplied.)

Of course this court in *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 and again in *Gagnon v. Scarpelli*, (May 14, 1973), 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 did refer to *Goldberg v. Kelly, supra*, insofar as the determination of whether rudimentary due process should be invoked in parole revocations and probation revocations and set forth the standards for such rudimentary due process; therefore, all of the speculative Federal Court cases as to whether and as to what rudimentary due process is due in disciplinary cases based on *Goldberg v. Kelly* would now seem to be irrelevant to the present discussion.

As stated by Mr. Chief Justice Burger in *Morrissey:*

"* * *. To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some

process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." (*Morrissey v. Brewer*, 408 U. S. 471, 481.)

(1) This Court has already noted the difference between liberty on parole and prison confinement.

The majority in *Morrissey* through Mr. Chief Justice Burger recognized the difference in the "liberty" of a parolee from a prison inmate, noting:

> "* * *. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. * * *." (*Morrissey v. Brewer, supra*, 408 U. S. 471 at 482.)

Later on the distinction is again made between a parolee's liberty from prisoners in custody:

> "* * *. Although the parolee is often formally described as being 'in custody,' the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. * * *." (*Morrissey v. Brewer*, 408 U. S. 471 at 483.)

Thus, in the determination in *Morrissey v. Brewer* whether life, liberty or property had been deprived thereby invoking due process, the court, definitely made a distinction between persons on parole and those in prison. If the prison inmate is to be deprived of "liberty" by the disciplinary proceeding it is certainly of a much less degree. It should also be emphasized at this point that this

court further recognized that in prison, *summary* treatment may well be necessary.

Inasmuch as losses of "good time" which go toward eligibility for parole are not cognizable in this review, the proposition that the prison inmate may be deprived of "liberty" at the disciplinary hearing is therefore quite questionable.

(b) Due process in prison disciplinary proceedings generally.

Assuming some process is due, look at what some of the people in the field have been saying and proposing may be enlightening.

The National Council on Crime and Delinquency has drafted a model act to provide for minimum standards for the protection of rights of prisoners, copyright 1972. The portion on disciplinary procedure is found in section 4 and provides in part as follows:

> "§ 4. Disciplinary Procedure.
>
> "* * *. Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall not be imposed without a hearing at which the prisoner shall have a right to be present and a right to be represented by counsel or some other person of his choice. * * *." ("An Act to Provide for Minimum Standards for the Protection of Rights of Prisoners," WASHINGTON UNIVERSITY LAW QUARTERLY, Summer 1973, p. 643 at 645.)

The above provision, while it has a provision for representation by counsel, is the only provision providing for

a hearing and apparently is limited to loss of good time—at least that would be its effect in Nebraska. There is no hearing provided for in any other type of punishment. In the same law review article the model act is discussed by various persons, one of whom James W. L. Park, Facilities and Program Planner, California Department of Corrections; formerly Associate Warden-Administration, California State Prison at San Quenton, states concerning section 4:

> "* * *. The 'right to be represented by counsel or some other person of his choice,' however, is a dangerously broad provision that could lead to a number of unfortunate circumstances. While representation by legal counsel may be welcome news to hundreds of unemployed young lawyers, it can result in an administrative nightmare in which all but the most gross forms of destructive behavior will be ignored by prison employees because of the endless litigation a charge of rule violation would entail.
>
> "California's relatively mild provision for an employee to serve as an 'Investigating Officer' has turned what used to be a five-minute process on minor infractions into hour-long hearings, occurring after days of delay. Under an attorney-adversary system, most men would likely be paroled before their cases were adjudicated. This, of course, would be acceptable to the radical left, which is promoting the notion that nothing a man does in prison should affect his chances for parole—a position that must be destructive, ultimately, to the safety of the ordinary citizen.
>
> "The phrase 'or some other person of his choice' can be extremely mischievous if construed to permit representation by fellow prisoners. The notion that prisoners will be nice to each other if only the warden would stop being oppressive is much favored by today's liberal reformers. The liberal position of yes-

teryear, however, that no prisoner should be allowed power over another, still seems sound to most prison administrators. Representing another prisoner in legal matters is a most coercive form of such power." ("An Act to Provide for Minimum Standards for the Protection of Rights of Prisoners," WASHINGTON UNIVERSITY LAW QUARTERLY, Summer 1973, p. 613.)

The Association of State Correctional Administrators during the year 1972 developed basic Policy Guidelines in eight important areas including disciplinary procedures and mail. The guidelines concerning serious misconduct are as follows:

"MAJOR VIOLATIONS:

"Every inmate charged with more serious misconduct should appear before the institutional disciplinary committee. Severe penalties, such as forfeiture of good time or extended confinement in punitive segregation, should only be imposed after a hearing before the disciplinary committee.

"An employee observing such misconduct should file a written report with a designated official prior to a hearing. The report should detail the nature and circumstances of the rule infraction.

"A supervisory officer should review each misconduct report and determine appropriate placement for the inmate pending the disciplinary hearing. Inmates involved may be confined apart from the general population awaiting action of the disciplinary committee. He may also request of any staff member additional investigation and information.

"Comments by the reviewing officer may be included with the misconduct report. This might include the results of investigation, statement of extenuating cir-

cumstances, or any other relevant evidence. A recommendation to dismiss the charges or proceed with the disciplinary hearing should be forwarded to the proper official.

"The institution may refer the matter to the proper authorities for prosecution. Such referral should not preclude institutional action against the inmate.

"HEARINGS:

"NOTICE:

"There should be adequate notice to the inmate of the alleged violation of institutional rules at a reasonable length of time prior to the hearings. Such notification should be documented.

"PREPARATION FOR HEARING:

"The inmate should be brought before the disciplinary committee as soon as practical. The committee may order further investigation of the alleged rule violation. Such investigation is to be completed as expeditiously as possible. The inmate may be granted, upon his request, reasonable additional time to prepare for the presentation of his case.

"COMMITTEE COMPOSITION:

"The committee should be composed of a minimum of three persons, representatives of the institutional staff appointed by the institutional head.

"The person who reported the rule violation and the person who has investigated the incident should not be members of the committee.

"INVESTIGATION:

"The relevant facts concerning the alleged rule violation should be made known to the inmate prior to the time of the hearing. The inmate should be given an opportunity to admit, explain, or refute the allegation.

"If the committee determines that significant additional information should be obtained from other persons, these persons should be contacted and this information should be considered by the committee before a final decision is made.

"FINDINGS AND DISPOSITION:

"After the committee has decided that all relevant information has been brought before it, the committee should dismiss all persons except those on the committee and carefully weigh the information. Written findings of the committee should be made after deliberation is completed. The disposition should be made appropriate to the needs of the individual and the institution. The individual should be informed promptly of the final decision of the committee, and of his right to appeal.

"RECORDS:

"Adequate record keeping is essential to prevent the appearance of arbitrary action and to provide a sound foundation for future judgments.

"Except where otherwise provided, there should be a record of every incident involving inmate disciplinary problems. A permanent copy of this record should be maintained in the inmate's file.

"Record of all later reviews of disciplinary action should be placed in the inmate's file with notation of action taken.

"REVIEW AND APPEAL:

"Each inmate should have the right to a review of any decision with which he is dissatisfied. The head of the institution should automatically review all decisions which result in serious consequence to an inmate, such as, loss of good time or punitive confinement.

"In review, the head of the institution may take the following actions:

"1. Confirm the decision.

"2. Order further or new proceedings.

"3. Reduce or suspend punishment.

"The head of the institution should not increase the amount of punishment.

"The inmate should be notified of the result of the final review of his case.

"If the inmate remains dissatisfied with the decision, after review by the head of the institution, he should have the right to appeal to the head of the correctional system.

"At the conclusion of any disciplinary action, including the termination of any restrictive confinemet which may have been imposed, an inmate may be reviewed by the regular classification process to determine if any change in assignment is appropriate. This process should not be considered a disciplinary action nor a punishment.

"The distinction between the disciplinary process and the classification process should be clearly defined and should not be permitted to become blurred." (UNIFORM CORRECTIONAL POLICIES AND PROCEDURES, The Association of State Correctional Administrators, 1972, pp. 12-15.)

In another study of professional persons interested in penal administration, but with few participants actually being employed as correctional administrators or staff, we find the following concerning prison disciplinary procedures:

"Because a prison is so volatile, and because it confines some of the most embittered and dangerous men

in our society, the problems of internal criminal justice are particularly troublesome. At least three kinds of offenses and issues are involved: (1) offenses against other inmates; (2) offenses against the administration; (3) offenses by administrators against inmates.

"Minimal due process would seem to require at least an impartial tribunal, the right to cross-examine and confront hostile witnesses, and the right to present one's own witnesses. Without these three elements, how can any fair hearing take place? And the stakes are very high: a possible loss of good time that may impose additional imprisonment for years, transfer to an even worse institution, loss of privileges, confinement to segregation, loss of a tolerable or good job or study assignment, an obstacle to parole, to mention but a few. And because there are so few good things in prison, the loss of any of these is particularly painful.

"Some courts have indeed agreed to allow these elements, while others, such as the United States Court of Appeals for the Second Circuit and Judge Wyzanski, here in Boston, have refused.

"Let us suppose that the Supreme Court orders that *all* disciplinary proceedings have all three elements. What impact will that really have?

"In the first place, there will probably be a massive guard strike, for the guards will feel threatened by such a set of procedures and understandably. Today, a guard's word against an inmate is never or rarely questioned, no matter what the setting or offense. Whether such acceptance is necessary to maintain security I doubt that anyone knows. But guards and some judges—Judge Wyzanski, for one—have made it abundantly clear that they think it would be very detrimental to prison discipline for an inmate even to challenge a guard on cross-examination. Many inmates, knowing their weak position vis-a-vis a pos-

sibly vindictive guard, administration or parole board, may avoid such a challenge.

"For the same reason, it may be especially difficult to get favorable witnesses to talk.

"Moreover, how impartial will the tribunal be? If it is part of the prison system, and if the matter involves either an offense against the administration or by a guard against an inmate, is real neutrality at all likely? Will an inmate's word ever be accepted over a guard's by a member of the correctional department? Hearing examiners completely outside the system are not even being seriously considered. But even if such outsiders were used, with luck we might be able to achieve the level of the lowest municipal criminal courts in our large cities, where police perjury is so rampant and successful. That's hardly an inspiring goal, though it would certainly be an improvement." ("Prisoners' Rights: Some Hopes and Realities" by Herman Schwartz, Professor of Law, State University of New York at Buffalo; A PROGRAM FOR PRISON REFORM, The Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 9-10, 1972, pp. 53-54.)

Even the above report omits any reference to representation by counsel in such proceedings.

A recent and interesting study was commenced in June 1970 by the Center for Criminal Justice of Harvard Law School into the impact of a Federal District Court decision in *Morris v. Travisono,* 310 F. Supp. 857 (D. R. I. 1970), which established comprehensive procedural regulations for disciplinary matters in the Rhode Island Adult Correctional Institution (A. C. I.). The field work for the study was conducted from June to August of 1970 in which a sample of 460 disciplinary records from both

the maximum and medium-minimum facilities were examined. The records covered periods both before and after the entry of the *Morris* decree. A total of 58 disciplinary proceedings were monitored and some 60 inmates were interviewed. Staff members were also interviewed and related court proceedings were monitored. The results of the study are documented in THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE.

The *Morris* decree mandated classification counselors as the representatives of the inmates at disciplinary board hearings. This did not seem to work out satisfactorily because the counselors were also employees of the institution. The report then goes on and touches upon the problem involved in the present case:

> "An alternative to using correctional staff for representational purposes might be to use outside counsel, but this, also, presents a number of problems. Outsiders, especially those assuming an adversary role, are often viewed with hostility and suspicion by the staff. Their 'interference' in prison affairs is resented, and they are seen as a threat by the staff, who fear any undermining of their authority and the possibility of civil liability suits against them. These fears might lead the staff to bypass the formal disciplinary process, where they would be subjected to counsel's investigation and interrogation, either by disciplining the inmates informally or by ignoring infractions of the prison rules. Outside counsel is also resisted because of a fear that Board proceedings will be transformed into criminal trials. A number of staff members felt that the decree already went too far in that respect:

> "'The fallacy is in instituting court procedures in the ACI hearings. We are not a court. . . . There are too many confusing technicalities in the order.
>
> "'The entire order is wrong as to discipline. The system should not be so formal. The average inmate is glad to get his court appearance over. He can then relax and do his time. However, with the new system, it is like he is always going back to court. The average inmate doesn't want to bother with such a formal system.'
>
> "Moreover, if retained counsel were permitted, equal protection problems would be raised regarding indigent inmates who could not afford such counsel. Finally, given the institutional de-emphasis on the entire fact-finding process, legal representation at Board hearings may not in fact be necessary in all disciplinary cases. To provide for such legal representation in particular cases would be tantamount to refocusing the disciplinary inquiry." (THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE, Vol. 63, No. 2, June 1972, p. 200.)

The following table from said study is most interesting. While the report does not attempt to explain the table, the argument that is frequently advanced by prison administrators that too much regulation on the prison authorities would result in more difficulty in handling the inmates seems to be justified since over nearly the same number of months before the decree and after the decree, misconduct after the decree increased almost three-fold.

Table 4. Misconduct Before and After the Decree

Misconduct	Date of Misconduct 7-69—3-10-70 Before	3-11-70—10-70 After
Trouble with Guards	27 (35%)	64 (31%)
Fighting/A & B	12 (15%)	47 (22%)
Refusals	12 (15%)	32 (15%)
Escape	1 (1%)	0 (0%)
Poss. Prohib. Articles	1 (1%)	15 (7%)
Alcohol, Drugs	2 (3%)	14 (7%)
Creating a Disturbance	0 (0%)	9 (4%)
Out of Place	0 (0%)	14 (7%)
Destruction of State Property	4 (5%)	4 (2%)
Throwing Food Out of Cell	14 (18%)	0 (0%)
Fire in Cell	2 (3%)	1 (1%)
Larceny of Table	2 (3%)	0 (0%)
Violating Security Rules	1 (1%)	1 (1%)
Cutting Wrists	0 (0%)	1 (1%)
Carrying Protest Sign	0 (0%)	5 (2%)
Total Number of Infractions	78 (100%)	207 (100%)

(THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE, Vol. 63, No. 2, June 1972, p. 200,216.)

In a study conducted under a grant from the Law Enforcement Assistance Administration the South Carolina Department of Corrections has published a 100 page document, copyright 1973, entitled INMATE GRIEVANCE PROCEDURES. (Available from said department.)

This report acknowledges assistance to the regular staff from Attorneys General, correctional administrators, wardens, correctional officers and inmates from various state institutions through information provided through questionnaires.

On the question of representation at disciplinary hearings, it states at page 26 thereof:

"Certainly, departments of correction would be hard pressed if forced to provide trained legal counsel for inmates facing disciplinary charges. The practical impossibility of meeting this requirement for the ma-

jority of indigent inmates who could not afford to retain their own counsel points to the need for an alternate approach. In Virginia, South Carolina, Michigan, the District of Columbia, and a few other states, lay advocates or prisoner representatives have been selected to fill this requirement. The South Carolina regulations provide:

> " 'If an inmate so requests, he will be provided with someone to assist him in preparing his case to present to the Adjustment Committee. At the Central Correctional Institution, Manning Correctional Institution, and Harbison Correctional Institution for Women, person(s) will be employed in this capacity. At the outlying institutions, members of the staff (excluding correctional officers) will be available to provide assistance for the inmates. A list of staff members who are available to represent the inmate will be available to the inmate. If the inmate does not wish to be represented by the next person on the list of employees, he may reject this person and select the next person on the list. However, the inmate will not be permitted to randomly select anyone on the list he wants to represent him. The persons who will assist the inmates will be fact finders in that their responsibility will be to interview the inmate, his witnesses, and other persons involved in the particular incident so that the representative may attempt to determine exactly how the incident occurred; he will be expected to present his findings to the Adjustment Committee as he determined from his investigation.'

"While any counsel substitute may lack the necessary advocate qualifications that guarantee proper representation, this can only be determined with experience. Interestingly, the Virginia system has included other inmates in its list of advocates who can be called on to represent another prisoner before an adjustment committee.

"In the District of Columbia, a 'Lawcor' project provides legally trained staff to handle the defense in discipline cases at the Lorton Institution. Oregon follows a similar procedure at one institution. In Michigan, prisoner advocate proceedings provide representation as follows:

> "'In all maximum security disciplinary cases, a resident is entitled to the assistance of a prisoner's advocate if he feels he needs help in preparing his defense to the charges of misconduct. He must request the services of a prisoner's advocate from the Reviewing Superior Officer, Control Center Administrator, or Disciplinary Block Supervisor prior to the day he is scheduled for a Disciplinary Committee hearing. The resident shall be informed of availability of this service in writing at the first review of his case.
>
> "'It shall be the responsibility of the Deputy Warden to maintain a listing of staff members, both Custody and Treatment, who will be assigned as prisoner's advocate on a rotating basis. Associate Counselors, Corporals, Sergeants, and Lieutenants will be eligible for listing; and the representation on the available list will be equally divided between Custody and Treatment.
>
> "'It shall be the responsibility of the prisoner's advocate to confer with the resident charged with misconduct prior to the Disciplinary Committee hearing; to make reasonable investigations of the resident's claims; and assist the resident in presenting his defense at the Disciplinary Committee hearing.'

"These internal reforms are all interesting variations on the basic concept of adequate representation, and go far towards ensuring that a fair hearing takes place for inmates charged with misconduct." (INMATE GRIEVANCE PROCEDURES, Law Enforce-

ment Assistance Administration, South Carolina Department of Corrections, 1973.)

Even the NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS section on CORRECTIONS, which admittedly is not necessarily attempting to set forth what the law or constitutions require in corrections but its "hopes that its standards and recommendations will influence the shape of the criminal justice system in this nation for many years to come" recognizes in its standard for disciplinary proceedings in a correctional facility that counsel substitutes are the most it can hope for—in its Standard 2.2 which states:

> "In the exercise of the foregoing rights:
>
> "* * * * * *.
>
> "3. Counsel substitutes may provide representation in proceedings or matters described in foregoing items 4 (disciplinary proceedings in a correctional facility) and 5, (civil legal problems relating to debts, marital status, etc.) provided the counsel substitute has been oriented and trained by qualified attorneys or educational institutions and receives continuing supervision from qualified attorneys." (Parenthetical phrase added.) (CORRECTIONS, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS.)

In the commentary explaining the Standard points out:

> "Recognizing the large and probably unmanageable burden on existing attorney resources, the standard validates supplemental use of lay assistance (law students, trained correctional staff, 'jailhouse lawyers,' or other paraprofessionals) even in matters requiring/

formal attorney representation. In this regard, a recent judicial observation in a California case dealing with right to counsel in parole revocation is instructive. The ruling, *In re Tucker*, 5 Cal. 3d 171, 486 P. 2d 657, 95 Cal. Rptr. 761 (1971) stated:

> "Formal hearings, with counsel hired or provided, for the more than 4,000 parole suspensions annually would alone require an undertaking of heroic proportions. But that is only the beginning. For if there is a right to counsel at parole revocation or suspension proceedings, no reason in law or logic can be advanced why a prisoner, appearing before the Adult Authority as an applicant for parole and seeking to have his indeterminate sentence made determinate, should not also have legal representation. The conclusion is inescapable that my dissenting brethren are in effect insisting upon counsel for a potential of 32,000 appearances annually: 28,000 parole applicants and 4,000 parole revokees. This monumental requirement would stagger the imagination." (CORRECTIONS, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS.)

Of course, when adding the inmate population of the United States to the above figures the proposition of furnishing lawyers admitted to the Bar for disciplinary proceedings becomes not only unrealistic but impossible.

Summary of Argument 1.

As to what process is due in a revocation of parole hearing this court specifically provided that an informant would not have to be subjected to confrontation and cross-examination if the hearing officer determined he would be subjected to the risk of harm. The court also specifically, as pointed out previously, refused to decide the question

of whether the parolee is entitled to the assistance of retained counsel or to appointment of counsel if he is indigent.

In discussing the question of counsel at probation revocation hearings in *Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 41 L. W. 4647, 93 S. Ct. 1756, in relation to the possible cost and time, this court pointed out:

> "* * *. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." (*Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 665.)

Noting that in the mid 60's there were an estimated average of 20,000 adult felony parole revocations and 108,000 adult probation revocations each year. We know of no specific figures of the number of serious misconduct reports filed against the entire prison population of the United States, but it would undoubtedly be so high as to keep the entire lawyer population of the United States working full time. And as noted earlier, if counsel were only appointed in certain types of misconduct this would open the door to untold thousands of civil rights cases where counsel was denied. Furthermore, a clerk's office would have to be established in each penitentiary to handle the filing of legal papers by the attorneys, extended delays in scheduling problems would result, attorneys would have to be hired to represent the prison staff, etc. etc. As mentioned by some of the writers, what would happen would undoubtedly be that the guards would stop filing misconduct reports and the inmates would gain another

foothold on having their own way in running the prison. Because of the much less liberty involved, and the untold thousands of disciplinary measures taken daily of persons in prison, the case by case approach of *Gagnon v. Scarpelli* is completely unsatisfactory and uncalled for in prison. Attorneys should not be permitted in said proceedings, period! Furthermore, the court in *Gagnon v. Scarpelli, supra,* recognized that the due process right to counsel of a parolee or probationer was less than the accused at a criminal or juvenile trial because of the very fact that such person has been convicted. Similarly, in the case of prison inmates the due process right is less than the parolee or probationer for the reason that he does not have freedom outside the walls and that he will have been placed in said penitentiary either through a due process hearing by the committing court or the due process hearing of the parole or probation revocation board. See *Gagnon v. Scarpelli*, 36 L. Ed. 2d 656 at 666.

2. Who initially lays down due process rules in prison discipline hearings?

The Honorable Court of Appeals, in its opinion in the present case, also specifically directed the Federal District Court to determine the minimum procedural due process standards in prison disciplinary proceedings. (App. 1, Petition for Writ of Certiorari, p. App-6, App-7, 483 F. 2d 1059, 1064.) This is in direct opposition to the holdings in both *Morrissey v. Brewer* and *Gagnon v. Scarpelli, supra.* In *Morrissey* the court stated:

"We cannot write a code of procedure; that is the responsibility of each State. * * *.

"* * * *.

"We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. * * * *." (*Morrissey v. Brewer*, 408 U. S. 471, 488, 490.)

The same general attitude is followed in *Gagnon v. Scarpelli* as to revocation of probation proceedings. This court stated:

"* * * *. The general guidelines outlined above should be applied in the first instance by those charged with conducting the revocation hearing." (*Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 667.)

3. Inspection of incoming attorney-inmate mail.

The court below, after stating that practical methods exist for insuring that incoming mail is actually from an attorney, stated:

"* * * *. If there is doubt, a simple telephone call should be enough to settle the matter; and the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the defendants' regulation permitting the opening and inspection of all legal mail. And the court's order does provide, as we suggested in *Moore*, legitimate means for detecting weapons or escape materials including, in the appropriate circumstances, opening a letter in the presence of the inmate." (Petition for Certiorari, App-1, p. 12; 483 F. 2d 1059, 1067.)

There are several problems involved in the above statement insofar as the prison authorities are concerned. In the first place, if the letter purports to be from an attorney in another state, as many of them are in state penal systems and many more are in the federal penal system, the telephone call is no longer simple and the accumulation becomes quite expensive; in addition, there is no way of knowing that the answering party is genuine.

More important than this, is the statement by the court that letters may be opened in the presence of the inmate in appropriate circumstances. This, to the penal authorities would mean that all letters from attorneys outside the state, whose reputation and background is not easily ascertainable, would constitute appropriate circumstances. A simple regulation on the behalf of the prison authorities to the effect that all incoming mail may be inspected for contraband if done in the presence of the inmate addressee would be the simplest and safest way to handle the matter. There is no adequate remedy that will erase the possible damage after the contraband has gotten in; the remedy must be applied to stop the contraband.

Morris Sigler, then Director of the Division of Corrections and Warden of the Nebraska Penal Complex illustrated the danger when he stated that throughout the years mail has been used for introduction of contraband into institutions everywhere, emphasizing that money and drugs are easily introduced through the mail (A. 6). He also emphasized that money in a penal institution is worth much more than on the street (A. 7).

While the penal authorities are concerned that letterheads of attorneys may be stolen or fictitiously printed, that employees or persons with access to attorney stationery may be the sender or that attorneys themselves may either naively or unscrupulously send contraband by letter, it is interesting to note also that during the 12 years Warden Sigler was at the Nebraska Penal and Correctional Complex he had 5 or 6 Nebraska attorneys as inmates in his institution for the commission of felonies (A. 9, 10).

In *Smith v. Robbins*, 454 F. 2d 696 (C. A. 1st Cir.) the court adopted a rule as contended for here, that mail addressed to the prisoner from a member of the State Bar could be opened for contraband in the presence of the prisoner, the court noting that if the prisoner is present he can see that the letter is not being read and that is enough. We respectfully contend that this is a reasonable restriction upon the right of access to the court and that such a rule is much less subject to abuse and more easily understood by prison officials than the complicated rules set forth by the Honorable Eighth Circuit in the opinion below in the present case.

4. Must state penal authorities furnish legal assistance, or a reasonable alternative, to inmates to prepare civil rights actions as well as habeas corpus suits?

The Honorable Court of Appeals in its opinion below, in considering the requirement of *Johnson v. Avery*, 393 U. S. 483, 21 L. Ed. 2d 718, 89 S. Ct. 747, that before a state could enforce a regulation barring inmates from furnishing assistance to one another it must provide some reasonable alternative, held that the state:

"* * * must take into account the need for assistance in civil rights actions as well as habeas corpus suits." See, *Nolan v. Scafati,* 430 F. 2d 548, 551 (1st Cir. 1970). See also, *Andrade v. Hauck,* 452 F. 2d 1071 (5th Cir. 1971). (App-1, Petition for Writ of Certiorari, p. App-9, 483 F. 2d 1059, 1065.)

This is unquestionably an extension of *Johnson v. Avery, supra,* and would create an immeasurable burden upon the prison systems and Federal Courts throughout the United States.

As this court knows, the specific holding of *Johnson v. Avery, supra,* was:

"* * *. But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for *post-conviction relief,* it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." (393 U. S. 483, 490.) (Emphasis supplied.)

Furthermore, throughout the opinion the court emphasizes the importance of the "Great Writ" of habeas Corpus. Examples:

"This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, * * *." (393 U. S. 483 at 485.)

"Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. * * *." (393 U. S. 483 at 485.)

This court further pointed out that a state may not validly make the writ available only to prisoners who

could pay a four dollar filing fee, citing *Smith v. Bennett*, 365 U. S. 708, 6 L. Ed. 2d 39, 81 S. Ct. 895. That *Ex parte Hull*, 312 U. S. 546, 85 L. Ed. 1034, 61 S. Ct. 640 invalidated a state regulation which required that habeas corpus petitions first be submitted to prison authorities. Further examples are unnecessary; suffice to say that the entire opinion is based upon post conviction actions.

There is no reason to extend the burden of the state, as the Court of Appeals would do, to require it to either permit jailhouse lawyers to operate or to furnish a reasonable alternative for the preparation of civil rights actions, which as this court knows, may include almost any kind of complaint, so long as it is grounded against action by the state or under color of state law. Whether or not this is a good policy, is immaterial. No one has thus far ever suggested that the Constitution requires the furnishing of assistance to free citizens in the preparation of their private legal matters much less extend the same to prison inmates.

The Court of Appeals, in support of its statement that the state must take civil rights actions into account, cited *Nolan v. Scafati*, 430 F. 2d 548, and *Andrade v. Hauck*, 452 F. 2d 1071. Neither of these cases, however, reach the nuts and bolts problem of furnishing a reasonable alternative to permitting inmates assisting other inmates. *Nolan v. Scafati* involved the refusal of the prison authorities to mail a letter to the Massachusetts Civil Liberties Union; *Andrade v. Hauck* involved the refusal of the prison authorities to permit an inmate to write a letter to a judge.

Thus, both of said cases are grounded on the access to the court's doctrine of *Ex parte Hull, supra,* and do not reach the problem of the affirmative duty of the state to furnish a reasonable alternative to permitting prison inmates assisting others as required by *Johnson v. Avery.*

The importance to the state and federal penal systems and the Federal Courts of an extension of *Johnson v. Avery* to include Civil Rights Actions is exemplified by the portions of the following tables:

Table 18. Civil cases commenced in the U.S. District Courts, during the fiscal years 1961 and 1968-72 by nature of suit

Nature of suit	Cases filed						percent change	
	1961	1968	1969	1970	1971	1972	1972 over 1961	1972 over 1971
Prisoner petitions:								
Federal	1,589	2,851	3,612	4,185	4,121	4,179	163.0	1.4
State	1,020	8,301	9,312	11,812	12,145	12,088	1,085.1	−0.5

(ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1972, p. 115.)

Table 19. Prisoner petitions filed in the U.S. District Courts fiscal years 1961 and 1966-72

Type of petition	Fiscal years								Percent change	
	1961	1966	1967	1968	1969	1970	1971	1972	1972 over 1961	1972 over 1971
Petitions by state prisoners	1,020	6,248	7,804	8,301	9,312	11,812	12,145	12,088	1,085.1	—0.5
Habeas corpus	1,020	5,339	6,201	6,488	7,359	9,063	8,372	7,949	679.3	—5.1
Other prisoner petitions	(1)	909	1,603	1,813	1,953	2,749	3,773	4,139	355.3	9.7
Mandamus, etc.	.....	691	725	741	684	719	858	791	.....	—7.8
Civil rights	.....	218	878	1,072	1,269	2,030	2,915	3,348	.....	14.9

(ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1972, p. 117.)

While habeas corpus cases are leveling off, civil rights and other petitions by inmates seem to be continuing upward. There is no valid constitutional reason why penal authorities should have to assist this upward trend.

This court has recently, of course, exhaustively examined the differences between civil rights actions and habeas corpus in *Preiser v. Rodriguez,* 411 U. S. 775, 36 L. Ed. 2d 439, 93 S. Ct. 1827, and the conclusions there reached recognizing the difference in the two types of actions are even more relevant to the question of extending *Johnson v. Avery, supra.*

5. May the Federal Court Order newly devised prison procedural requirements to be applied retroactively?

The Court of Appeals in the instant case stated that it would be appropriate for the district court to order expunged from prison records determinations of misconduct arrived at in hearings that failed to comport with minimum due process requirements. (App. 1, Petition for Writ of Certiorari, p. App-7, 483 F. 2d 1059, 1064.)

In its order denying a rehearing the court went on to state that prison authorities would be given an opportunity to state whether they will provide or permit counsel on those cases which must be reheard for lack of procedural or substantive due process (App. 3, Petition for Writ of Certiorari, p. App-50, 483 F. 2d 1059, 1067).

The Court of Appeals is thus attempting to impose the requirements of *Morrissey v. Brewer*, contrary to *Morrissey v. Brewer* itself, wherein this court stated:

> "* * *. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. * * *." (*Morrissey v. Brewer*, 408 U. S. 471, 490.)

The Sixth Circuit in the case of *Valdez v. Perini*, 474 F. 2d 19, 20-21, and the Seventh Circuit in *Zizzo v. United States*, 470 F. 2d 105, 108, both deferred to the above language of *Morrissey v. Brewer* in applying new prison disciplinary standards prospectively only.

CONCLUSION

For all of the reasons set forth, petitioners respectfully contend that the Court of Appeals' judgment below should be reversed. Petitioners respectfully pray that this court will set forth the broad guidelines as to what process is due, if any, in prison disciplinary proceedings and that such guidelines, if any, should be implimented in the first instance by the prison authorities as to future cases and not by the Federal courts. That the court adhere to its limitation of *Johnson v. Avery* requirements to post conviction remedies and that the extension of such

requirements to civil rights actions by the Court of Appeals should also be reversed. That the case be remanded to the Court of Appeals for Judgment accordingly.

Respectfully submitted,

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